

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

To Be Argued By
JAMES F. Mc ARDLE

ORIGINAL

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

75-1195

UNITED STATES OF AMERICA,

Appellee,

-against-

JAMES BROWN, a/k/a JAMES FEDERICO,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR THE APPELLANT



JAMES F. Mc ARDLE
Attorney for Defendant-Appellant
123-60 83rd Avenue
Kew Gardens, New York 11415
Telephone: (212) 793-4140

[COVER PAGE I]

PAGINATION AS IN ORIGINAL COPY

PAUL L. CURRAN
U. S. Attorney, Southern
District of New York
Attorney for Appellee
U.S. Courthouse
Foley Square
New York, New York 10007
Telephone: (212) 264-6118

[COVER PAGE II]

TABLE OF CONTENTS

	<u>Page</u>
Preliminary Statement.....	1
Statement of Facts.....	2
Argument:	
<u>POINT I</u> - 28 USC 515 (a) Controls and Limits the Broad Powers Vested in the Attorney General by 28 USC 509 and 510.....	3
<u>POINT II</u> - The Appointment in This Case Did Not Comply with 28 U.S.C. 515 (a)....	14
<u>POINT III</u> - Defendant Properly Moved Against an Indictment Where an Unauthorized Person was Present During the Grand Jury Sessions.....	16
<u>POINT IV</u> - The Plea of Guilty is Not a Waiver of Appellant's Claim, Inasmuch as it Involved a Jurisdictional Defect..	17
CONCLUSION.....	17

INDEX TO APPENDIX

	<u>Page</u>
Docket Entries in the District Court.....	A-1
Opinion and Order of Judge Pollack Denying Motion to Dismiss the Indictment.....	A-6
Transcript of Proceedings of February 18th, 1975; Oral Motion to Dismiss the Indictment.....	A-19
Transcript of Proceedings of March 3rd, 1975; Enter Plea of Guilty to Count One.....	A-23
Transcript of Proceedings of April 18th, 1975; Sentence.....	A-29
Indictment No. 74 Cr. 867, Count One.....	A-37

TABLE OF CASES

Page

<u>The Confiscation Cases</u> , 74 U.S. (7 Wall) 454, 457-58 (1868).....	5
<u>Flora v. U.S.</u> , 362 U.S. 145, 151 (1960).....	6
<u>Lewis v. Commissioners</u> , 74 N.C. 1974.....	16
<u>Mc Mann v. Richardson</u> , 397 U.S. 759 (1970).....	17
<u>North Carolina v. Alford</u> , 400 U.S. 25 (1970).....	17
<u>N.L.R.B. v. Bell Aerospace Co.</u> 416 U.S. 267, 274 (1974).....	6
<u>United States v. Amazon Industrial Chemical Corp.</u> 55 F. 2d 254 (D. Maryland 1931).....	12
<u>United States v. Bowdach</u> , 324 F. Supp. 123 (S.D. Fla. 1971).....	16
<u>United States v. Carper</u> , 116 F. Supp. 817 (D.D.C. 1953).....	16
<u>United States v. Crispino</u> , 74 Crim. 932 (S.D.N.Y. Feb. 13, 1975).....	2
<u>United States v. Crosthwaite</u> , 168 U.S. 375 (1897).....	6
<u>United States v. Daneals</u> , 370 F. Supp. 1289 (W.D.N.Y. 1974).....	16
<u>United States v. Edgerton</u> , 80 F. 374 (D. Montana 1897). 16	
<u>United States v. Goldman</u> , 28 F. 2d 424 (D. Conn. 1928). 9	
<u>United States v. Hall</u> , 145 F. 2d 781 (9th Cir .1944) cert. denied 324 U.S. 871 (1945).....	13
<u>United States v. Huston</u> , 28 F. 2d 451; 454 (N.D. Ohio 1928).....	9
<u>United States v. Isaacs</u> , 347 F. Supp. 743 (N.D. Ill. 1972).....	16
<u>United States v. Morse</u> , 292 F. 273 (S.D.N.Y. 1922).....	10

<u>United States v. 1,960 Acres of Land</u> , 54 F. Supp. 867 (S.D. Cal. 1944).....	13
<u>United States v. Powell</u> , 81 F. Supp. 288 (E.D. Mo. 1948).....	12
<u>United States v. Rath</u> , 406 F. 2d 757 (6 cir,) cert. denied 369 U.S. 828 (1969).....	16
<u>United States v. Rosenthal</u> , 121 F. 862 (c.c. S.D.N.Y. 1903).....	6
<u>United States v. Wise</u> , 370 U.S. 405, 414 (1962).....	6

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket No. 75-1195

UNITED STATES OF AMERICA,

Appellee,

- against -

JAMES BROWN, a/k/a JAMES FEDERICO,

Defendant-Appellant,

BRIEF FOR THE APPELLANT

PRELIMINARY STATEMENT

James Brown, a/k/a James Federico, appeals from a judgment of conviction entered in the Southern District of New York on April 18th, 1975, before the Honorable Milton Pollack, United States District Judge, on a plea of guilty to Count One of Indictment No. 74 Cr. 867 (conspiracy), whereby Brown was sentenced to a term of imprisonment of three years and fined \$2,500.00. Appellant was continued on bail by Judge Pollack pending appeal.

Indictment 74 Cr. 867, charged defendant Brown, together with codefendants JAMES J. PHILIPS, FREDERICK G. HORWITZ and MARVIN STOFF, one count of conspiracy to pass, possess and deal in counterfeit U.S. obligations (Title 18, United States Code, Section 371); three counts of passing counterfeit U.S. Obligation (18 USC 472); three counts of dealing in counterfeit U.S. obligations (18 USC 473); and three counts of possessing counterfeit U.S. obligations (18 USC 474).

Upon sentence imposed on the conspiracy count, the nine remaining counts were dismissed on consent of the Government.

On February 18th, 1975, a trial of defendant BROWN commenced in the

District Court. On February 25th, 1975, the jury beind deadlocked as to verdict, a new trial was ordered. On March 4th, 1975, when the new trial was commenced BROWN withdrew his plea of not guilty to count one of the indictment (conspiracy) and pleaded guilty to that count.

Prior to the commencement of the trial on February 18th, 1975, BROWN moved to dismiss the indictment, which motion was denied. This appeal brings up for review and is limited to the propriety of the denial of the motion to dismiss.

STATEMENT OF FACTS

On February 18th, 1975, prior to the commencement of the trial, BROWN joined in a motion with defendant PHILIPS pursuant to Federal Rules of Criminal Procedure 12 (b) (2), to dismiss the indictment, on the ground that Edward J. Levitt, a Special Attorney with the Organized Crime and Racketeering Section of the Criminal Division, United States Department of Justice, who had presented the case to the Grand Jury, was not authorized to appear before the Grand Jury (A-19, 22). The motion was made on the basis of the decision of Judge Henry F. Werker in U.S.A. v. Crispino, 74 Crim. 932 (S.D. N.Y. Feb. 13, 1975). Judge Pollack denied the motion from the bench (A-22) and subsequently, on February 25th, 1975, entered a written opinion and order (A-6).

It was stipulated by the Government that the letter of authorization to Mr. Levitt was identical to the letter of authorization issued to Charles E. Padgett, the special attorney in Crispino (A-20). Any reference in this brief to documents naming Mr. Padgett should be deemed to apply to Mr. Levitt.

ARGUMENT

POINT I

28 USC 515 (a) CONTROLS AND LIMITS THE
BROAD POWERS VESTED IN THE ATTORNEY
GENERAL BY 28 USC 509 and 510.

Appellant does not contest the broad power of the Attorney General to conduct criminal litigation. The issue at bar is whether there are any limits to this power; specifically, whether the terms "specifically appointed" and "specifically directed" are to be given any importance. We respectfully submit that:

(a) Congress intended to put limits on the power;

At the outset, we acknowledge reliance upon the well reasoned opinion of Judge Werker in the Crispino case and have excerpted material from that opinion in support of our position.

The statute under which Mr. Padgett was appointed a Special Attorney is codified at 28 USCA Sec. 515 and provides:

(a) The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

(b) Each attorney specially retained under authority of the Department of Justice shall be commissioned as special assistant to the attorney General or special attorney, and shall take the oath required by law. Foreign counsel employed in special cases are not required to take the oath. The Attorney General shall fix the annual salary of a special assistant or special attorney at not more than \$12,000.00.

On June 1st, 1973 Henry Petersen, then Assistant Attorney

General in charge of the Criminal Division, wrote the following letter to Mr. Padgett

Department of Justice
Washington 20530
June 1, 1973

Mr. Charles E. Padgett
Criminal Division
Department of Justice
Washington, D.C.

Dear Mr. Padgett:

The Department is informed that there have occurred and are occurring in the Southern District of New York and other judicial districts of the United States violations of federal criminal statutes by persons whose identities are unknown to the Department at this time.

As an attorney at law you are specially retained and appointed as a Special Attorney under the authority of the Department of Justice to assist in the trial of the aforesaid cases in the aforesaid district and other judicial districts of the United States in which the Government is interested. In that connection you are specially authorized and directed to file informations and to conduct in the aforesaid district and other judicial districts of the United States any kind of legal proceedings, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States Attorneys are authorized to conduct.

Your appointment is extended to include, in addition to the aforesaid cases, the prosecution of any other such special cases arising in the aforesaid district and other judicial districts of the United States.

You are to serve without compensation other than the compensation you are now receiving under existing appointment.

Please execute the required oath of office and forward a duplicate thereof to the Criminal Division.

Sincerely,
s/ HENRY E. PETERSEN
Assistant Attorney General

The serious and complex question presented in this motion is

whether Special Attorney Pagett within the meaning of Section 515 (a) was "specifically directed by the Attorney General" (or as in this case by a subordinate of the Attorney General to whom the Attorney General had properly delegated the function to appoint Special Attorneys) to present the Brown case to the grand jury. To resolve this question it is necessary to examine the legislative background of the original act which is now codified as 28 U.S.C. Sec. 515 (a) and the cases which have construed that act.

By the Judiciary Act of 1789, 1 Stat. 73, Congress provided for the appointment of attorneys for each district whose duty was to prosecute "crimes and offences, cognizable under the authority of the United States..." 1 Stat. at 92. These attorneys were eventually called District Attorneys and are now known as United States Attorneys. The same act also created the office of the Attorney General who in 1861 was charged with the general superintendence and direction of the District Attorneys. Despite the Attorney General's power of supervision, it was still the function of the District Attorneys to represent the United States in criminal and civil actions. See The Confiscation Cases, 74 U.S. (7 Wall) 454, 457-58 (1868).

In 1861 Congress also provided that the Attorney General could appoint special assistants to the District Attorneys to aid them in the discharge of their duties. When the Department of Justice was created in 1870, the Attorney General was authorized to appoint "special assistant (s) to the Attorney General" to assist in the "trial of any case." As a check on his power to employ special counsel when needed, Congress required the Attorney General to certify that the services of special counsel were actually rendered and that the same services could not have been performed by the Attorney General or some

other officer of the Department of Justice. See United States v. Crosthwaite, 168 U.S. 375 (1897). From 1861 to 1903 the Attorney General often employed such special counsel either as assistants to the various district attorneys or as special assistants to the Attorney General. Such counsel not only assisted in the trial of the cases, but also participated in grand jury proceedings.

The right of the special attorneys to appear before grand juries was not questioned until 1903 when in the case of United States v. Rosenthal, 121 F. 862 (c.c. S.D. N.Y. 1903), the court held that the power of the Attorney General to conduct and argue any "case" in any court did not authorize him to make appearances before grand juries. As a direct consequence of the Rosenthal decision, Congress passed the Act of June 30th, 1906, 34 Stat. 816, which with a few minor changes is currently codified at 28 U.S.C.A. Sec. 515 (a). This act enabled special attorneys to conduct legal proceedings, including grand jury proceedings, "when specifically directed by the Attorney General."

The legislative history of the Act of June 30th, 1906 provides an important source for understanding the purposes of the statute as envisioned by Congress. Cf., United States v. Wise, 370 U.S. 405, 414 (1962); Flora v. United States, 362 U.S. 145, 151 (1960) "frequently the legislative history of a statute is the most fruitful source of instruction as to its proper interpretation". See also N.L.R.B. v. V. Bell Aerospace Co., 416 U.S. 267, 274 (1974). The act of 1906, was introduced in both Houses of Congress, and it was the House version of the bill that passed. The House Report which accompanied the bill provided as follows:

Mr. Gillett of California from the Committee on the

Judiciary submitted the following:

The Committee on the Judiciary, having had under consideration the bill (H.R. 17714) to authorize the commencement and conduct of legal proceedings under the direction of the Attorney-General, respectfully report the same back with the recommendation that the same do pass.

The purpose of this bill is to give to the Attorney General, or to any officer in his Department or to any attorney specially employed by him, the same rights, powers, and authority which district attorneys now have or may hereafter have in presenting and conducting proceedings before a grand jury or committing magistrate.

It has been the practice of the Attorney General for many years to employ special counsel to assist district attorneys in the prosecution of suits pending in their respective districts whenever the public interest demanded it. It has been the practice of such special counsel to appear, with the district attorney, before grand judges and committing magistrates and to assist in the proceeding pending there. This right passed unchallenged for many years, until the Circuit Court for the Southern District of New York, on March 17th, 1903, in the case of the United States v. Rosenthal, decided that --

The Attorney General, the Solicitor General, nor any officer of the Department of Justice, is authorized by Sections 359, 367, or any other provision of the Revised Statutes of the United States (U.S. Comp. St. 1901 pp. 207, 209), to conduct, or to aid in the conduct of, proceedings before a grand jury, nor has a special assistant to the Attorney General such power.

And the court further held that --

A special assistant to the Attorney General, appointed to investigate and report concerning alleged fraudulent importations of Japanese silks at the port of New York, and to prepare and conduct such civil and criminal proceedings as may result therefrom, is not authorized by law to conduct, or to aid the conduct of, proceedings before a federal grand jury, and indictments based upon such proceedings so conducted should be quashed upon motion.

This decision makes the proposed legislation necessary if the Government is to have the benefit of the knowledge and learning of its Attorney General and his assistants, or of such special counsel as the Attorney General may deem necessary to employ to assist in the prosecution of a special case, either civil or criminal. As the law now stands, only the district attorney has any authority to appear before a grand jury. no matter how important the case may be to the interests of the Government to have the assistance of

one who is specially or particularly qualified by reasons of his peculiar knowledge and skill to properly present to the grand jury the question being considered by it.

The Attorney General states that it is necessary, in the due and proper administration of the law, that he shall be permitted to employ special counsel to assist the district attorney in cases which district attorneys or lawyers do not generally possess, and in cases of such usual (sic) importance to the Government, and that such counsel be permitted to possess all of the power and authority in that particular case, granted to the district attorney, which, of course, includes his right to appear before a grand jury either with the district attorney or alone.

It seems eminently proper that such powers and authority be given by law. It has been the practice to do so in the past and it will be necessary that the practice shall continue in the future.

If such a law is necessary to enable the Government to properly prosecute those who are violating its laws, it is no argument against it that some grand jury may be, perhaps, unduly influenced by the demands or importunities that may be made upon it by such special counsel. The same argument can as well be made against permitting a district attorney from attending a sitting of such jury.

There can be no doubt of the advisability of permitting the attorney General to employ special counsel in special cases, and there can be no question that if he has been employed because of his special fitness for such a special case that the Government should have the full advantage of his learning and skill in every step necessary to be taken before the trial, including that of appearing before grand juries.

The law proposed by the bill under consideration seems to be very necessary, because of the decision in the Rosenthal case, hereinbefore referred to, and the committee recommend its speedy enactment.

H.R. Rep. No. 2901, 59th Cong., 1st Sess. (1906) (emphasis added).

The House Report leaves no room for doubt that Congress intended the Attorney General to have the power to appoint special attorneys to prosecute a particularly important case or a special case or cases. This power was seen as a necessary aid to effective law enforcement. Rather than restricting the appearances of these attorneys to the trial of cases, it was deemed appropriate that they appear in every

step of the litigation including grand jury proceedings. However, since the district attorneys and their regular assistants had the responsibility for prosecuting all crimes in their districts, the appearance of special attorneys before grand juries was limited to special cases where the Attorney General concluded that the particular knowledge and skill of these special attorneys would be useful.

(b) Courts have construed 515 (a) as properly limiting the otherwise broad power of the Attorney General.

Subsequent to the enactment of what is now section 515 (a), challenges to the authority of special attorneys to appear before grand juries presented a number of courts with the problem of interpretation of the statute. Specific issues raised included whether the commission of the special attorney had to specify (1) the case (s) to be investigated; (2) the district (s) in which the investigation was to take place; and (3) the statute (s) which was to be the basis for the indictment against the defendant. The commission letter of the special attorney was in fact the "specific direction" of the Attorney General, United States v. Huston, 28 F. 2d 451, 454 (N.D. Ohio 1928) and it is the language of that letter which formed the basis for motions to dismiss indictments brought by special attorneys.

A rule of strict interpretation was formulated in United States v. Goldman, 28 F. 2d 424 (D. Conn. 1928) where an attorney, who was commissioned as a Special Assistant to the United States Attorney for the district of Connecticut, appeared before a grand jury not to assist the district attorney, but to act as a stenographer. In construing the commission of the special attorney, the Court concluded that:

As we understand it, the commission which may be

issued under the act must designate the specific case or cases to which the employment relates and the district or districts to which it extends. If this is not so, it would follow that the Attorney General of the United States could, under the act now under discussion, issue a roving commission without any limitations, extending to every district in the United States and embrace all criminal investigations.

Goldman, supra at 430 (emphasis original). No other court has adopted such a strict interpretation of the statute. Indeed, other cases not discussed by the court in Goldman, has established that the commission need not name every case to be investigated and every district in which the investigation was to take place. Such was the holding in United States v. Morse, 292 F. 273 (S.D.N.Y. 1922). In that case, one Fletcher Dobyns was appointed a special attorney by the Attorney General to investigate persons engaged in the sale of stock of certain named corporations. The appointment letter specifically referred to the Southern District of New York and to the particular criminal statute that were being violated. Mr. Dobyns did not limit his investigation to the companies and persons named but extended it to interrelated companies and persons having to do directly or indirectly or indirectly with the sale of their stock. In upholding the right of Mr. Dobyns to appear before the grand jury in those cases, then district judge Augustus N. Hand concluded that:

The letter of appointment would naturally relate to causes of action, criminal or civil, in which the United States was interested growing out of the relation. I see no reason for assuming, because on the face of the letter no interrelation is set forth, that it is not sufficiently specific. Indeed, it probably is as specific as was possible, if adequate power to deal with the situation without impairment of usefulness or unnecessary reduplication of labor were to be given. Nor does the fact that proceedings may be taken in more than one district render the authority broader than the act of 1906 justified, for no such limitation seems necessarily involved in

the language of the act, and to impose it would cause unnecessary inconvenience in enforcing the law.

Morse, supra at 276. The test relied upon by Judge Hand was "whether the designation as counsel which he received from the Attorney General was sufficiently specific." Id. at 275 (Emphasis added).

United States v. Huston, 28 F. 2d 451 (N.D. Ohio 1928) is in accord with Morse. In that case, the special assistant to the Attorney General received two commissions each of which specified several defendants "and others associated with them" to be investigated and which named the statutes violated. The first commission named the Western District of Missouri and the second the district of Minnesota as the places where the cases were pending. The special attorney was authorized to conduct legal proceedings in those two districts "or in any judicial district where the jurisdiction thereof lies." This last phrase became important since the indictment was returned in the Northern District of Ohio. The court, faced with the problem of interpreting what is called "this enigmatical phrase," concluded that the special attorney was not authorized to appear before the grand jury in Ohio for

No charge brought against the defendants here (Ohio) by the bill under consideration has any dependent or ancillary connection with the alleged crimes in either Minnesota or Missouri. Here he (the Special Attorney) began de novo to assist in the development of a possible but independent offense, whose existence depended upon facts peculiarly and particularly within the jurisdiction of this district alone, with which neither the Missouri nor Minnesota district had any concern whatever.

Huston, supra at 456. Thus, the fatal element in the Huston case was not that the commission failed to specify the Northern District of Ohio,

but that the Ohio investigation was not "ancillary" to the properly authorized investigation in Missouri and Minnesota.

Two cases hold that it is not necessary that the commission letter name the particular statutes on which the indictments were based. The Special Assistant to the Attorney General in United States v. Amazon Industrial Chemical Corporation, 55 F. 2d 254 (D. Maryland 1931) received a commission which specified the particular case and several named defendants to be investigated. The commission did not refer to the particular federal statutes which were allegedly violated. The court considered this a "mere matter of form and not of substance" and cited the principle that "even if the wrong statute is named in an indictment, the indictment may be good, provided the facts alleged therein constitute a crime." Amazon, supra at 256-57. United States v. Powell, 81 F. Sipp. 288 (E.D. Mo. 1948) is to the same effect and is also consistent with Morse, supra. In Powell the Special Attorney was commissioned to investigate irregularities in a certain general election in the Eastern District of Missouri. The indictment returned against the defendants involved the primary election and not the general election. Recognizing that the statute (then 5 U.S.C.A. Sec. 310) was mainly for "the protection of the United States" and should be given the meaning which is more helpful and practical in the dispatch of the government's business, the court concluded

That fraud in a Primary to select candidates for such General Election is not so far removed as to be an abuse of authority or complete deviation from authority, nor is the fact the indictment was returned under a statute other than the statute named in the commission grounds for dismissing the indictment.

Powell, supra at 291.

Perhaps the case which gives the broadest response to the question "was the special attorneys commission sufficiently specific," see Morse, supra, is United States v. Hall, 145 F. 2d 781 (9th Cir. 1944), cert. denied, 324 U.S. 871 (1945). After a lengthy and thorough discussion of the power of the Attorney General to appoint special attorneys, District Judge Hall, in United States v. 1,960 Acres of Land, 54 F. Supp. 867 (S.D. Cal. 1944) had concluded that the local district attorney must initiate and prosecute condemnation proceedings on behalf of the Government in order to give the court jurisdiction. The Ninth Circuit in Hall disagreed and issued a writ of mandamus directing Judge Hall to assume jurisdiction. The issue involved the setting up of a "lands division" office in the Southern District of California by the Department of Justice. Special Attorneys were assigned to the Office and specifically directed to conduct certain "Lands Division" cases as may be assigned to them. In holding that the special attorneys were authorized to conduct the proceedings, the court concluded

that such authorization need not be directed to specifically designated cases but may be designated and limited descriptively as was done in the instant case by the Attorney General when he authorized Mr. Brett and the attorneys under his immediate direction to act in the kind of case, to wit: such land cases as from time to time shall be assigned to the Los Angeles Lands Division Office.

Hall, supra at 785 (emphasis added). It should be noted that in Hall the local district attorney had agreed that the specialized work of the Lands Division could best be handled without his assistance. The result was consistent with the legislative history of now Section 515 (a) where Congress recognized the need for the appointment of special attorneys with "peculiar knowledge and skill."

POINT II

THE APPOINTMENT IN THIS CASE DID NOT COMPLY WITH 28 U.S.C. 515 (a)

The broadly worded letter of appointment did not conform to the Congressional limitations on the Attorney General's otherwise broad power over criminal litigation. Is it "sufficiently specific"?

The first paragraph of Mr. Padgett's commission states:

The Department is informed that there have occurred and are occurring in the Southern District of New York and other judicial districts of the United States violations of federal criminal statutes by persons whose identities are unknown to the Department at this time (emphasis added).

The second paragraph appoints Mr. Padgett a special attorney to assist in the trial of and conduct proceedings in connection with the "aforesaid cases." But what are these "aforesaid cases"? The first paragraph says they are cases involving the violation of "federal criminal statutes." Can this be considered a "specific direction from the Attorney General as required by the statute"? In this commission "sufficiently specific"? Clearly not. It is precisely the opposite. It is as broad and as vague as possible. Nowhere in the commission is there any attempt to give a description of the type of cases-- such as "organized crime cases," or "Lands Division cases," or "tax fraud cases," etc.-- which Mr. Padgett may be commissioned to investigate and present to grand juries.

The legislative history of section 515 (a) and the cases analyzed show that it is not necessary to specify in the commission letter all the defendants who may be indicted, or all the cases which are pending, or all the statutes which may be violated for the statute should be

given an interpretation that is helpful to the prosecution of cases by the government. But the one element that is common to every case which has either upheld or dismissed challenges to the authority of special attorneys to appear before grand juries is that the commission letter is least described particularly the type of cases (e.g., "Lands Division" cases in United States v. Hall, supra) that the special attorneys were to present to grand juries. That element is conspicuously missing in this case. Nowhere is there an attempt to conform to the intent of congress in limiting the appearance of special attorneys before grand juries to "cases of particular importance" where those "specially or particularly qualified" by reason of "peculiar knowledge and skill" would be helpful to the prosecution of important cases by the government. Surely it is no argument to say that any violation of a "federal criminal statute" involves a case of particular importance where those with peculiar knowledge and skill not possessed by the local United States Attorney and his assistants are needed to prosecute the case.

The commission letter issued to Mr. Padgett is a bold assertion of authority by the Attorney General to appoint special attorneys in any case regardless of its importance and regardless of whether any particular skill or knowledge is required. If upheld it would allow these special attorneys to supersede the local United States Attorneys and their regular assistants, whose statutory duty for the last 186 years has been to prosecute all offenses against the United States in their districts, in any cases involving a violation of a "federal criminal statute." Congress never intended to give such a broad authority when it passed the Act of 1906 even if the statute be for the "protection of the United States," and no case contruing that

statute supports such a proposition.

POINT III

DEFENDANT PROPERLY MOVED AGAINST AN INDICTMENT
WHERE AN UNAUTHORIZED PERSON WAS PRESENT DURING
THE GRAND JURY SESSIONS.

The unauthorized appearance of a person before a Grand Jury warrants dismissal of the indictment. Mr. Levitt's appointment was not in conformity with 28 USC 515 (a); and as a result, he was an unauthorized person.

A long line of cases supports the policy as expressed in United States v. Edgerton, 80 F. 374 (D. Montana 1897):

There must not only be no improper influence or suggestion in the grand jury room, but, as suggested in Lewis v. Commissioners, 74 N.C. 1974, there must be no opportunity therefor. If the presence of an unauthorized person in the grand jury room may be excused, who will set bounds to the abuse to follow such a breach of the safeguards which surround the grand jury?

See United States v. Carper, 116 F. Supp. 817 (D.D.C. 1953);

United States v. Bowdach, 324 F. Supp. 123 (S.D. Fla. 1971);

United States v. Isaacs, 347 F. Supp. 743 (N.D. Ill. 1972);

See also United States v. Daneals, 370 F. Supp. 1289 (W.D. N.Y. 1974).

Compare United States v. Rath, 406 F. 2d 757 (6th Cir.), cert. denied, 369 U.S. 828 (1969). Clearly, the list of persons permitted to appear before the grand jury by Rule 6 (d) of the Federal Rules of Criminal Procedure does not include unauthorized government attorneys.

POINT IV

THE PLEA OF GUILTY IS NOT A WAIVER OF APPELLANT'S CLAIM, INASMUCH AS IT INVOLVED A JURISDICTIONAL DEFECT.

It is axiomatic that a guilty plea entered by a defendant is a waiver only of non-jurisdictional defects. Mc Mann v. Richardson, 397 U.S. 759; North Carolina v. Alford, 400 U.S. 25. (1970).

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED
AND THE INDICTMENT DISMISSED.

JAMES F. Mc ARDLE
Attorney for the Appellant
Office & P.O. Address
123-60 83rd Avenue
Kew Gardens, N.Y. 11415
(212) 793- 4140

JUDGE POLLACK

rehal, 1, 3, 2
orney,
Commissioner's Court,

15-1695

Obligations. (Or.)

Pollack, J.)

Wilty plea be
ing indictment.
fixed by the

A

~~A-1~~
A-1

Docker Entries

Page 2 Judge Pollack

DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
9/23/74	Deft. Stoff appears (atty present) Deft. pleads not guilty bail cont'd as previously fixed by the Magistrate at \$25,000. PRB secured by \$25,000. cash to be co-signed by deft.'s wife. Bail limits to extend to the Eastern District. Moley, J.		
10/4/74	Filed affirmation of James F. Moyle.		
10/8/74	James Phillips- filed notice of appearance by atty. (see front)		
12/6/74	Def. Marvin Stoff (att. Andrew Fowler present) now pleads guilty as to count one only. Counts 2 - 7 incl. and count 10 are carried until the date of sentence. Pre-sentence report ordered. For sentence 1/15/75 at 10 AM in room 906. Bail cont'd. Pollack, J.		
2/12/75	Fredrick G. Horwitz- (atty. present) deft. now pleads guilty to count 1 only. Counts 2 - 10 incl. are carried until date of sentence. Pre-sentence report ordered. For sentence 3/3/75 at 10 AM room 906. Bail cont'd. Pollack, J.		
2/13/75	Filed deft. J. Brown's notice re: order for severance, etc.		
02-10-75	<i>Filed transcript of record of proceedings dated Dec 6, 1974</i>		
02-20-75	<i>Filed transcript of record of proceedings, dated Dec 13, 1974</i>		
02-25-75	Filed <u>OPINION # 41936</u> - ...With respect, therefore, I cannot follow path of Judge Werker on this issue. Defts.' motions to dismiss the indictment because at strike force representative proceeded against them before the Grand Jury bare denied. Pollack, J. mn		
02-18-75	Filed deft. J. Philips' notice of acknowledgment of constitutional rights		
02-18-75	Filed deft. F. G. Horwitz' notice of acknowledgment of constitutional rights.		
02-18-75	Filed deft. M. Stoff's notice of acknowledgment of constitutional rights		
-cont'd. on next page-			

cont'd. on next page- *B*

Docket Entries

FILED—PROCEEDINGS

CLERK'S FEES

AMOUNT
REPORTED IN
EMOLUMENT
RETURN

PLAINTIFF

DEFENDANT

- 02-18-75 James Brown & James J. Philips (atty. present) case called for trial. Deft. James J. Philips (atty. present) not pleads guilty as to count 1 only. Counts 2 to 10 inclusive are carried until date of sentence. Pre-sentence report ordered. For sentence 4/15/75 at 10AM room 7. Bail cont'd.
- 02-18-75 James Brown-jury trial begun before Judge Pollack.
- 02-19-75 Trial cont'd.
- 02-20-75 Trial cont'd.
- 02-21-75 Trial cont'd.
- 02-24-75 Trial cont'd.
- 02-25-75 Trial cont'd. and concluded. Mistrial declared with the consent of both sides. Jury exused. Case rescheduled for trial on 3/4/75 at 10AM Pollack, J.
- 02-26-75 Filed ORDER that pursuant to 18 U.S.C. 6002 that James J. Philips give testimony which he refused to give on the basis of his privilege against self incrimination as to all matters about which he may be interrogated during the trial of U.S. -vs- James Brown, etc. Pollack, J. (marked as Court's exhibit #2)
- 02-26-75 Filed ORDER that pursuant to 18 U.S.C. 6002 that Fredrick Horwitz give testimony which he refused to give on the basis of his privilege against self incrimination as to all matters about which he may be interrogated during the trial of U.S. -vs- James Brown, etc. Pollack, J. (marked as Court's exhibit #1)
- 03-04-75 J. Brown- filed deft.'s acknowledgment of constitutional rights.
- 03-04-75 J. Brown- (atty. present) Case called for trial. Deft. now pleads guilty as to count 1 only. Counts 2-10 incl. are carried until date of sentence. Pre-sentence report ordered. For sentence 04-18-75 at 10AM room 7. Bail cont'd. Pollack, J.

Docket Entries

FILING - PROCEEDINGS

CLERK'S FEES

AMOUNT
REPORTED IN
EMOLUMENT
RETURNS

- 4-1-75 Filed transcript of record of proceedings, dated 2/18-19-20/75
- 4-2-75 Filed transcript of record of proceedings, dated 2/21-24-26/75
- 4-18-75 JAMES BROWN(atty. present) Filed JUDGMENT # 75,340 - deft. is committed to the custody of the Atty. Gen'l. for imprisonment for a period of THREE (3) YEARS. and FINED \$2,500. The deft. is to stand committed until the fine is paid or he is otherwise discharged according to law. The deft. is cont'd. on present bail \$25,000 surety bond to 5-12-75 at 10am at which time he is to surrender to the custody of the U.S. Marshal to commence service of sentence, in room 506. Counts 2-10 are dismissed on consent of the Govt. Pollack, J. issued all copies
- 4-18-75 FREDRICK G. HORWITZ (atty. present) Filed JUDGMENT # 75,341 - deft. committed to the custody of the Atty. Gen'l. for imprisonment for a period of TWO (2) YEARS; and on condition that the deft. be confined in a jail type institution for a period of SIX (6) MONTHS, the execution of the remainder of the sentence of imprisonment is suspended and the deft. is placed on probation for a period of THREE (3) YEARS, subject to the standing probation order of this Court; said probation to commence upon expiration of prison sentence, pursuant to 18:3651. -AND- deft. is FINED \$2,500. Fine is to be paid during the time the deft. is serving probation on a schedule to be arranged with the Probation Department. The deft. is cont'd. on present bail \$10,000 to 5-12-75 at which time he is to surrender to the custody of the Marshal at 10 AM in room 506 to commence service of sentence. Counts 2 through 10 are dismissed on motion of deft.'s counsel with consent of the Govt. Pollack, J. issued all copies
- 4-24-75 Filed deft. J. Brown's notice of appeal from judgment and order denying defts motions to dismiss prior to trial, etc. mailed notices.
- 4-28-75 Filed deft. James Brown's affidavit. re: reduction of sentence.
- 4-30-75 Filed Govt.'s (for defts. Stoff & Philips) sentencing memorandum.
- 4-30-75 Filed Govt. affidavit. of mailing re: sentencing memo of 4-30-75.

cont'd. on page 5

Docket Entries

George Pollack

74 Cr. 867

Docket Continuation

DATE	PROCEEDINGS	Date Order Judgment N
05-01-75	Filed Govt.'s affdvt. re: opposition to stay of execution.	
05-01-75	Filed memo-end. on motion docketed 4-23-75. (deft. J. Brown) Bail cont'd. pending appeal. Pollack, J. mn	
06-06-75	JAMES J. PHILIPS (atty. present) Filed JUDGMENT # 75-415, deft. is committed to the custody of the Atty. Gen'l. for imprisonment on count 1 for a term of three (3) years, and on condition that deft. be confined in a JAIL TYPE institution for a period of SIX (6) MONTHS, the execution of the remainder of the sentence of imprisonment is hereby suspended and the deft. is placed on Probation for a period of FIVE (5) YRS, subject to the standing probation order of this Court, T. 18, Sec. 3651 U.S. Code to commence upon expiration of confinement and FINED \$2,500. (this is NOT a committed fine). The schedule of the payment of the fine is to be decided by the Probation Department. Counts 2-10 incl. are dismissed on motion of the Govt. counsel. The deft. is cont'd. on present bail until 5-20-75 at 10 AM at which time he is to surrender to the U.S. Marshal in room 506 for service of sentence. Pollack, J. issued all copies.	
12-01-75	James Brown- bench warrant issued.	

A TRUE COPY
 RAYMOND A. BURCHARDT, CLERK
[Signature]
 Deputy Clerk

A-5

Opinion and Order

MILTON POLLACK, District Judge.

This prosecution charges defendants with crimes under the counterfeiting statutes and conspiracy to violate the same. 18 U.S.C. §§472, 473, 474, and 371. The attorney who presented the case to the Grand Jury was Edward J. Levitt, a special attorney with the Organized Crime and Racketeering Section of the Criminal Division, United States Department of Justice (the "Strike Force").

Defendants James Philips and James Brown joined in a motion pursuant to Fed. R. Crim. P. 12(b)(2) prior to trial to dismiss the indictment against them on the basis of the decision of Judge Werker in U.S.A. v. Crispino, 74 Crim. 932 (S.D.N.Y. Feb. 13 1975). It was there held that the Special Strike Force created with the advent of the Justice Department's assault on organized crime was not authorized to appear before the Grand Jury in that case because the appointed assistant prosecutor was not in terms told that he could appear before the Grand Jury which functioned on the indictment therein.

Opinion and Order

In this case Mr. Levitt stated for the record that the commission authorizing him to prosecute crime in this District was identical to that considered by Judge Wecker in Crispino. After denial of his motion to dismiss the indictment, the defendant Philips pleaded guilty reserving his rights to raise on appeal the question raised in Crispino.

The relevant statute in question here is 28 U.S.C. §515(a), which reads as follows:

The Attorney General or any officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States Attorneys are authorized by law to conduct,
...

It is conceded herein as Judge Wecker also found in Crispino that the Attorney General was empowered to designate an assistant to extend the authorization to the Strike Force attorney and that Mr. Petersen, Assistant Attorney General, was so designated and in turn commissioned the prosecutor, a member of the Strike Force staff, to undertake any kind of grand jury proceedings in any kind

Opinion and Order

of legal proceedings which United States Attorneys are authorized to conduct.

Here, Prosecutor Levitt was, by his commission letter

authorized and directed to file informations and to conduct in the [Southern] District [of New York] and any other judicial Districts of the United States any kind of legal proceedings, civil or criminal, including Grand Jury proceedings and proceedings before committing magistrates, which United States Attorneys are authorized to conduct.

Clearly, therefore, in express terms Mr. Levitt was specifically authorized and directed to conduct the kind of grand jury proceedings that led to the indictment here. He was authorized for "any kind" of prosecution which a regular United States Attorney could conduct before any Grand Jury. This is not a case where the prosecutor has been authorized and directed to prosecute only one type of case or to proceed only against a particular defendant or to perform only one particular function and where nonetheless he has overstepped such limited and special authority. Compare, United States v. Hall, 145 F.2d 781 (9th Cir. 1944), cert. denied, 324 U.S. 871 (1945).

Opinion and Order

As the legislative history indicates, the Congress in enacting the statute which has now become §515(a) was attempting to expand the authority of the Attorney General to comprehensively and effectively combat crime. The background for the enactment was that in 1903, the Circuit Court for the Southern District of New York had held that neither the Attorney General nor his assistants were authorized by law to appear before grand juries as prosecutors. United States v. Rosenthal, 121 F. 862 (C.C. S.D.N.Y. 1903). In direct response to this decision, Congress passed the statute here in question, making it clear that the Attorney General and those under his direction were empowered to conduct any criminal or civil proceedings which United States Attorneys were authorized to conduct. H.R. Rep. No. 2901, 59th Cong., 1st Sess. (1906).

While much has been made of the congressional intent said to be illustrated by the inclusion of the phrase that the Attorney General's deputy be "specifically directed" to conduct legal proceedings, it is clear that in the upper house at least the requirement was not given much consideration. The Senate version of the bill,

S. 2969, did not contain the word "specifically" at all. 40 Cong. Record 7013-14 (1906). This version was withdrawn by the Senate when the House passed its version and H.R. 17714 was passed by the Senate. 40 Cong. Record 9662 (1906). The fact that the statement of H.R. 17714 in the Congressional Record description of the Senate proceedings omits the word "specifically" also seems to indicate its relative unimportance in the legislation at least from the Senate's viewpoint. 40 Cong. Record 9662 (1906).

At the time the statute was passed, special prosecutors apparently were appointed from time to time to prosecute specific crimes concerning which they had particular knowledge or competence. Questions inevitably arose as to whether these specially appointed prosecutors had, in bringing particular cases, overstepped the bounds of their limited commissions. See, e.g., United States v. Powell, 81 F. Supp. 288 (E.D. Mo. 1948); United States v. Amazon Industrial Chemical Corp., 55 F.2d 254 (D. Md. 1931); United States v. Huston, 28 F.2d 451 (N.D. Ohio 1928); United States v. Hovee, 292 F.273 (S.D.N.Y. 1922).

Opinion and Order

There is no question here, however, that the prosecutor was authorized to conduct the instant proceedings, as the Attorney General, through his deputy Mr. Petersen, legally conferred upon Mr. Levitt the broad power to conduct "any kind of proceeding" before any grand jury that the United States Attorney can conduct.

An examination of the history and purposes of the strike forces reveals the reason why this broad grant of power and direction was considered necessary by the Department of Justice and why it is proper.

While the appointment of single special prosecutors, each commissioned ad hoc to focus on specific instances of crime, and each having a particular legal competence, may have been appropriate in the early years of this century, by the latter ^{part} of the 1960's, conditions had clearly changed. As the President said in a 1968 message to Congress, "It is clear that sporadic, isolated, uncoordinated attacks on the disciplined army of the underworld cannot obtain lasting results." "To Insure the Public Safety -- Message from the President of the United States", (H.Doc. 250), 114 Cong. Record 2412 (Feb. 7, 1968).

Opinion and Order

The concept of "strike forces" of federal officers to deal with organized crime was first developed by Attorney General Ramsey Clark during the presidency of Lyndon Johnson, in response to a general feeling on the part of the Administration and the Congress that the federal government had been ineffective in fighting crime. See, e.g., "Federal Effort Against Organized Crime: Report of Agency Operations", by the Legal and Monetary Affairs Subcommittee of the House Committee of Government Operations (House Rep. No. 1574, 90th Congress, 2d Session) reported in 114 Cong. Record 21014 (July 12, 1968) at 21014 "The Federal Government has not borne its obligation with the constancy and force that its role in the overall battle against organized crime demands."

In a message to Congress not long after taking office President Nixon informed the Congress that the strike forces already set up would be continued and new units would be initiated. In his speech of April 23, 1969, the President said that the strike forces were necessary

[t]o combine in one cohesive unit a cadre of experienced Federal investigators and prosecutors, to maintain a Federal presence in organized crime problem areas throughout the nation on a continuing basis ...

Opinion and Order

These officers bring together, in cohesive single units, experienced prosecutors from the Justice Department, special agents of the F.B.I., investigators of the Bureau of Narcotics and Dangerous Drugs, the finest staff personnel from the Bureau of Customs, the Securities and Exchange Commission, the Internal Revenue Service, the Post Office, the Secret Service, and other Federal Officers with expertise in diverse areas of organized crime.

The President noted that "[t]o deal with the heavy concentration of criminal elements in the Nation's largest city", the Strike Force in the Southern District of New York would take the form of a special Federal-State Racket Squad, which would emphasize cooperation between federal and local authorities. "Organized Crime Message from the President of the United States" (H. Doc. No. 91-105), 115 Cong. Record 10041, 10042 (Apr. 23, 1969). This unit was actually set up in New York on July 7, 1969 and it is as a member of this unit that Mr. Levitt received his authorization and direction from the Attorney General.

The statutory requirement of a specifically directed authorization was apparently enacted in an atmosphere of the appointment of individual special prosecutors with

Opinion and Order

particularized experience for particular cases. But this should not be and has not been interpreted as a requirement to thwart the comprehensive sweep of the statutory language, which was to facilitate the government's prosecutorial efforts when unleashed by the Attorney General to deal with rackets and organized crime through an elite corps of the government's prosecutors.

The issue raised here, in the context of a different atmosphere was apparently first considered in this District in 1922, when Judge Augustus Hand decided U.S. A. v. Morse; 292 F. 273 (S.D.N.Y. 1922). There also a defendant had challenged the authority of a specially appointed prosecutor to appear before the Grand Jury which had indicted him. The appointment was a limited one -- pertaining only to a particular situation -- not as here for "any kind" of situation. One of the issues with which the Court in Morse was faced was "whether the designation as counsel which [the special prosecutor] received from the Attorney General was sufficiently specific". At 275. The prosecutor in that case had two commission letters, one of which mentioned three criminal statutes and stated the objects of the prosecution to be defendants related to

Opinion and Order

specified corporations. The Court found the authorization to be sufficiently specific, noting that more specificity might deny the prosecutor "adequate power to deal with the situation without impairment of usefulness or unnecessary reduplication of labor." (At 276).

It is on exactly this point that this Court must disagree with the well-researched opinion of Judge Werker. The authorization here to the members of the Special Strike Force was without limitation -- it was to prosecute "any kind of legal proceedings including Grand Jury proceedings" The commission was to meet the needs of modern law enforcement, to give the Strike Force prosecutor "adequate power to deal with the situation [any situation] without impairment of usefulness or unnecessary reduplication of labor.

Section 515(a) of Title 28 U.S.C. may properly be read not as a limitation but as a broad grant authorizing commissions as general as those in the letters questioned here. Compare Shushan v. United States, 117 F.2d 110 (5th Cir. 1941); In Re Persico, 75 Civ. 96 (E.D.N.Y. Feb. 5, 1975); United States v. Sheffield Farms Co., 43 F. Supp. 1 (S.D. N.Y. 1942).

Opinion and Order

The concerns expressed in Crispino on the subject of overly broad commissions do not seem to apply to Strike Force situations. The appointment of Strike Force attorneys was not intended to create a competition as between the regular local prosecutors and the members of the nationally organized strike force teams. Each serve a separate need and purpose. One does not supersede the other -- they complement each other's function. The situations dealt with by the Strike Force cannot be equated with routine and local situations normally prosecuted in particular Districts nor to authorizations that might fall into legally insufficient competence.

Since the statute does not confine its application to particular facts or particular defendants, it would appear appropriate for the Courts to implement the public policies to be served through Strike Forces by upholding a broad grant of authority and to sustain a commission that directs members of the specially selected Strike Force to prosecute any kind of legal proceeding. Indeed to hold that such commissions are insufficiently specific would not serve any public purpose but might have mischievous and drastic effects as a precedent against the current needs

Opinion and Order

of law enforcement across the country. No fundamental rights are at stake here that need be conserved in the constitutional interests of criminal targets. There is a strong public interest in implementing the broad purposes of the Congress and the executive by upholding the authority of the special prosecutors of the Strike Force.

This is not a case like United States v. Giordano, 416 U.S. 505 (1974), where the Justice Department had attempted to utilize improperly its authority to proceed with wire-tap surveillance -- an intrusion on the right of privacy constitutionally safeguarded. The failure of the only accredited public official to personally assume responsibility and to properly authorize the wiretaps in Giordano was in disregard of clearly defined statutory mandates and frustrated a congressional policy legislated for the benefit of individuals.

In this case the congressional purpose was not to limit or hobble the pursuit of organized crime -- rather the Congress and the executive intended to expand existing prosecutorial facilities and weapons. The specific authoriza-

Opinion and Order

tion and direction intended was not by way of a limitation of but an extension of the government's ability to prosecute "any kind" of crime in "any kind" of legal proceeding.

As the Court stated in Haberman v. Finch, 418 F.2d 664, 666 (2d Cir. 1969):

It is a familiar maxim of statutory interpretation that Courts should enforce a statute in such a manner that its overriding purpose will be achieved, even if the words used leave room for a contrary interpretation.

Here the overriding purpose of 28 U.S.C. §515(a) is to benefit and protect the public by expanding the prosecutorial capacity of the federal government, and that purpose would clearly not be served by an interpretation that would place unnecessary black-letter limitations on the attorneys of the "strike forces" in their prosecution of organized crime.

With respect, therefore, I cannot follow the path of my brother Werker on this issue. Defendants' motions to dismiss the indictment because a Strike Force representative proceeded against them before the Grand Jury are denied.

SO ORDERED.

February 24, 1975

Milton Pollack
U.S. District Judge

1 arh

2

2 MR. LEVITT: The government is ready, your Honor.

3 MR. McARDIE: For the defendant Brown, James
4 McArdle. I am ready.

5 THE COURT: Is the defendant Philips ready?

6 MR. HURWITZ: Your Honor, over the weekend I read
7 an article in the Daily News or it was called to my at-
8 tention involving an opinion by Judge Werker on a matter
9 emanating from the Strike Force and this morning at 9 o'clock
10 Mr. Purcell and I went up to Judge Werker's chambers and
11 read the opinion.

12 THE COURT Yes.

13 MR. HURWITZ: In the light of the opinion I feel
14 constrained on behalf of the defendant Philips to raise that
15 issue at this time.

16 THE COURT: What do you mean when you say raise it?
17 Just raise it and lower it or are you making an application
18 to the court?

19 MR. HURWITZ: Your Honor, in the light of the
20 opinion we would on behalf of the defendant Philips we
21 would like to determine whether or not the letter of authoriza-
22 tion the Department of Justice, to the Assistant who handled
23 the matter before the grand jury was the same or similar
24 to the letter that authorized the Assistant, Mr. Padgett
25 in that case, and that if that were so, then we would make

A-19

a motion to dismiss based on Judge Werker's decision.

THE COURT: Mr. Levitt?

MR. LEVITT: Yes, your Honor. I believe that the decision that Mr. Hurwitz is referring to is United States v. Crispino in which Judge Werker decided that last week.

I state for the record that as regards that letter and my letter, all letters from my office designating authorization are in fact similar in weight and content save that the parties named who are designated as the special attorneys change in the appropriate case.

The government position your Honor as to this motion is that in fact the government is now seeking permission of the Solicitor General in the Crispino case to take an appeal from that issue. Judge Werker's decision is based on a very narrow area of law, to wit, whether or not there has to be a specific designation that the individual appointed to prosecute this matter should be stated within the letter who prosecute organized crime cases, that the case involves organized criminals.

If the Court wishes to hear such motion the government believes that Judge Werker's decision was wrong but, as far as there is an appeal sought now in the Crispino case and there has been a decision in the Eastern District of New York which came down last Monday I believe in the

A-20

Persico case in favor of the government on the same matter, and that the defendant in that case is appealing, if the Court wishes to have argument on this motion, the government would ask for a continuance of ten days to present a full set of papers on that narrow area.

THE COURT: We will not continue this case, this case will proceed to trial.

MR. LEVITT: In that case it is the government's position that Judge Werker's decision is in error and that the government's authorization for me is such to make--

THE COURT: Have you got the letter of authorization?

MR. LEVITT: I do not have that letter here, your Honor. However, I do have Judge Werker's decision wherein he sets forth Mr. Padgett's letter which is indeed the same form of letter.

THE COURT: I have the opinion here.

MR. LEVITT: I believe it is page 3 on which the letter appears.

May I state it is my understanding of Judge Werker's decision that the decision in no way undercuts the power of the Attorney General to appoint special attorneys, nor the power of the Attorney General to designate such appointive power to the Assistant Attorney General.

Also I would like to point out, your Honor, that

1 arh

2 in contrast to Judge Werker's opinion there are approximately
3 six decisions of recent note that have come down opposite
4 to that which Judge Werker concluded and those have occurred
5 in the District of Kansas, the Eastern District of Wisconsin,
6 the district which encompasses Miami, and the district
7 which encompasses Las Vegas and the Eastern District of
8 New York and the Northern District of California.

9 If the Court wishes I would be glad to supply
10 the Court with the names of those cases. I don't believe
11 they are cited yet.

12 THE COURT: The motion is denied.

13 MR. McARDIE: Could we have the same grounds of
14 that motion for Brown?

15 THE COURT: Your motion is denied too.

16 MR. LEVITT: Before the panel comes in I believe
17 Mr. Hurwitz has informed me that if the Court were to deny
18 his motion he wishes to take up a matter with you concerning
19 the defendant Philips at this point.

20 MR. HURWITZ: May we go in the robing room, your
21 Honor?

22 THE COURT: All right.

23 (The following took place in the robing room.)

24 MR. PURCELL: Your Honor, we want to plead guilty
25 to the conspiracy count.

A-22

1 lh

2 the Court?

3 MR. MC ARDLE: Yes, sir. At this time, if your
4 Honor please, the defendant -- I have discussed this matter
5 with James Brown, and he asks leave of this Court to withdraw
6 his previous plea of not guilty to the indictment, and I
7 assume -- is that the amended indictment, Judge, or the --

8 THE COURT: No.

9 MR. MC ARDLE: The indictment, and he offers to
10 plead to count 1 of the indictment, the conspiracy count.

11 THE COURT: There are some inquiries that I wish
12 to make, Mr. Brown, and I will ask you to respond.

13 EXAMINATION BY THE COURT:

14 Q What is your full name?

15 A James Leonard Brown.

16 Q What is your age?

17 A Thirty-eight.

18 Q What is the extent of your education and schooling?

19 A I have two years of high school and then I took the
20 equivalency test for high school, passed it, and had inten-
21 tions of going to college, signed up for it but never went,
22 never had the money.

23 Q Are you currently or have you recently been under
24 the care of a physician or a psychiatrist?

25 A No, sir.

Plea of Guilty

Brown

3

1 lh

2 Q Are you addicted to any narcotic drug?

3 A No, sir.

4 Q I take it that you have read and understand the con-
5 tents of the conspiracy count, count 1, of this indictment in
6 74 Crim. 867; is that right?

7 A That's correct, sir.

8 Q Have you had time to consult with your attorney in
9 respect to your proposed course of action this morning?

10 A Yes, sir.

11 Q Are you satisfied with Mr. McArdle's advice in
12 connection with your proposed course of action?

13 A Yes, I am satisfied with his advice.

14 Q Do you want count 1, the conspiracy count, read to
15 you at this time or will you waive the reading as unnecessary?

16 A I will waive the reading as unnecessary.

17 Q How do you wish to plead to count 1, the conspiracy
18 count of this indictment?

19 A Guilty, your Honor.

20 Q Have you been informed of your constitutional rights
21 in this case through the statement, the typewritten statement,
22 that was handed to you in court?

23 A Yes, sir.

24 Q Have you read that carefully and do you understand
25 it?

Plea of Guilty

1 lh

Brown

4

2 A Yes, I do, and I read it carefully.

3 Q Did you then sign your name at the foot to signify
4 that you have read it and understood it?

5 A Yes, sir.

6 THE COURT: Mr. McArdle, you have signed as attorney?

7 MR. MC ARDLE: I have.

8 THE COURT: The statement of constitutional rights
9 is ordered filed with the proceedings of this case.

10 Q Are you familiar, Mr. Brown, with the range of
11 penalties to which you may be subjecting yourself by your
12 plea of guilty to the conspiracy count, including the maximum
13 sentence on that count?

14 A Yes, sir.

15 Q What do you understand that that might be as a maxi-
16 mum?

17 A I understand the maximum sentence on that count
18 would be five years.

19 Q And a \$10,000 fine, either or both, do you under-
20 stand that?

21 A I understand it now, your Honor.

22 Q Does that cause you to want to change your mind about
23 pleading guilty to the conspiracy count?

24 A No, sir.

25 Q Have any threats or promises been made to you to

Plea of Guilty

1 lh

Brown

5

2 induce you to plead guilty to count 1?

3 A No, sir.

4 Q Is there any understanding or has any prediction
5 been made to you concerning the sentence that you will receive?

6 A No, sir.

7 Q Has any officer or agent or attorney of any branch
8 of the government promised or suggested that you will receive
9 a lighter sentence or probation if you plead guilty to count 1?

10 A No, sir.

11 Q What acts did you commit in connection with the
12 charges made against you to indicate to me that you committed
13 the necessary acts and had the knowledge and intent to commit
14 the crime of conspiracy?

15 A I was involved in a conspiracy in this act, and
16 that's it, your Honor.

17 Q In saying that you were involved --

18 A May I speak briefly, your Honor?

19 Q Yes.

20 A I was involved to the fact that I know what was
21 going on, that I was present at certain times when discussions
22 were going on about this, and that I was, if anything went
23 through on this, supposed to make some money on it also.

24 Q Do you understand that a conspiracy count requires
25 proof of an agreement between two or more persons to commit an

Plea of Guilty

1 lh

Brown

6

2 offense?

3 A Yes, sir.

4 Q Under the counterfeiting laws?

5 A Yes, sir.

6 Q Do you understand that the Government must prove
7 beyond a reasonable doubt knowledge of the existence of the
8 conspiracy and an intent on your part to participate in the
9 unlawful enterprise?

10 A Yes, sir.

11 THE COURT: Mr. McArdle, do you know of any reason
12 why Mr. Brown should not plead guilty to the offense of con-
13 spiracy to counterfeit?

14 MR. MC ARDLE: No, there is no reason why he should
15 not plead.

16 THE COURT: The Court accepts the plea, finding
17 that the plea is knowledgeable, voluntary and has a basis in
18 fact, it contains all of the elements of the crime. A pre-
19 sentence report will be ordered here. The open counts will
20 be carried until the date of sentence. The defendant's bail
21 conditions will be continued until the date of sentence, and
22 the date of sentence is fixed for April 18, 1975, in courtroom
23 7 at 10 a.m. I believe that that completes the proceedings
24 this morning.

25 (Court adjourned.)

Sentence

1 pgbr

2 MR. LEVITT: The government is ready, your

3 Honor.

4 MR. McARDLE: The defendant is ready for
5 sentence.

6 THE COURT: Mr. McArdle, is there anything
7 you wish to say on behalf of Jams Brown before imposition
8 of sentence?

9 MR. McARDLE: I have submitted a brief
10 sentence memorandum.

11 THE COURT: I have read it carefully.

12 MR. McARDLE: I am aware there has been a thorough
13 probation report. Of course I was here when the trial
14 originally commenced and ended and when the plea was taken,
15 so I am aware that you are completely in control of the
16 factual situation.

17 I would ask your Honor to be as compassionate as
18 possible under the circumstances.

19 THE COURT: Mr. Brown, is there anything you
20 want to say in your own behalf before imposition of sen-
21 tence?

22 DEFENDANT BROWN: No, sir.

23 THE COURT: Mr. Levitt, is there anything
24 you want to say on behalf of the government?

25 MR. LEVITT: The government has nothing to say,

A-29

pgbr

3

your Honor.

THE COURT: This 38-year old defendant stands before the Court having been convicted by a plea to one count of a 10-count indictment in which he was charged with conspiracy to counterfeit United States Treasury bills. Belatedly, but to his credit, Brown admitted his involvement in the scheme and admitted his association with his co-defendants. He seeks to minimize his involvement by merely acknowledging that he financed a scheme intended to produce bills.

This defendant has a history of a number of arrests dating back some years. They represent, however, matters which are not given substantial weight in connection with the imposition of sentence here.

Brown's participation, as brought out during the course of his trial, which ended in a disagreement, was to bring Phillips, the provocateur, and Horwitz together and to finance the conspiracy. He agreed to finance the scheme of creating \$27 million worth of counterfeits for one-third of what he calls in his statement "the action," plus one per cent per week on any money that he laid out to finance the purchase of a genuine Treasury bill so that it could be copied, and any other incidental expenses incurred by his cohorts.

A-30

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

pgbr

4

Brown did lay out \$10,000 to buy such a Treasury bill and, as we know, Horwitz made the plates, printed the bills, and \$2 million of face value was offered to an undercover agent for \$200,000, the proceeds to be split \$100,000 amount Phillips, Horwitz and Brown, and the balance to the offerer; subsequently \$1,900,000 face amount was offered at \$40,000 and the perpetrators were apprehended.

It is sometimes thought, and undoubtedly correctly, that the supplier of the means of creating criminality is more culpable than those who carry out the criminality. They provide the vehicle for the others to function.

Phillips was a bankrupt; Horwitz was reasonably impecunious for purpose of this scheme, and it took the assets of Brown to put the matter together, and he exacted not only an interest in the ill-fated venture but also an interest charge for his accommodation.

Here, again, this defendant has many good friends and associates who have spoken well of him and for him; but to characterize the defendant as honest and sincere is a euphemism and a charade to which he is not entitled.

It is not for me to run down that opinion in the minds of his friends, but it is hardly honest to crookedly print up \$27 million in counterfeit instruments expecting to profit and to make money out of it.

A-31

Sentence

pgbr

5

Under all the facts and circumstances it is the judgment of the Court that the defendant be committed to the custody of the Attorney General, or his authorized representatives, for a term of three years, and fined the sum of \$2500, which will be a committed fine. The remainder of the counts against this defendant, which have been carried until the date of sentence with the consent of the government, will be dismissed.

MR. LEVITT: The government consents, your Honor.

THE COURT: They are dismissed.

The defendant is remanded.

MR. McARDLE: May I make an application, Judge?

THE COURT: Yes.

MR. McARDLE: I forwarded to the Court, the presentence memorandum, some doctor's lines. I have I have spoken to the defendant and his wife and his mother-in-law today. They indicate to me that this child is Francine, 16 or 17 years old, who is the subject of the letter, the doctor's lines. This child is presently under evaluation for surgery for the replacement of a hip joint with a metal appliance or prosthetic device. The surgeon who will eventually determine this matter is

A-32

Sentence

1 pgr

6

2 abroad. He is in Spain and will be back in a period of
3 two to three weeks. His name is Dr. Siffert. His office,
4 I believe, is on Fifth Avenue.

5 I will respectfully ask a stay of execution for
6 a period of two or three weeks.

7 THE COURT: What do you say to that, Mr. Levitt?

8 MR. LEVITT: On the date of apprehension or
9 subsequent date of arraignment Mr. Brown asked to be re-
10 leased as soon as possible because his daughter had had an
11 accident; she had fallen out the window, and this occurred
12 at a time when Mr. Brown was at the Sage Diner.

13 The government recommends that Mr. Brown be
14 remanded, and if the need arises, Mr. Brown can make appropri-
15 ate requests to Probation or Parole for special furloughs.

16 THE COURT: What are the terms of the present
17 bail?

18 MR. LEVITT: \$25,000 surety bond. Sufficient
19 surety is in the form of a deed to the house of Mrs. Brown --
20 or the former Mrs. Brown.

21 THE COURT: Do you have a passport, Mr. Brown?

22 DEFENDANT BROWN: No, sir. Never had one.

23 THE COURT: Where do you reside?

24 DEFENDANT BROWN: 35 Hasslewood Drive, Jericho,
25 Long Island.

A-33

Sentence

pgbr

7

THE COURT: Is that a home you own?

DEFENDANT BROWN: It is a home that my wife owns. It is in my wife's name, but we live together there, my wife and children.

THE COURT: How many children do you have?

DEFENDANT BROWN: Two. I have a daughter 15 and another one 17. The one that is in question is 17 years old.

THE COURT: She had an accident?

DEFENDANT BROWN: Yes. She fell six stories out of a window in February of 1973. She has been in and out of the hospitals many, many times. She has been in St. John's Hospital for four months at one time and Long Island Jewish. They replaced the partial right back of the heel. They had to take it off and the kid is really going -- excuse the expression -- "through hell."

Now they want to put a plastic joint in the hip. It is not for sure. We have to wait for the doctor to come back and make the determination.

THE COURT: Have you had any indication from his office as to the actuality of his return?

DEFENDANT BROWN: Yes. They said he would be back within two or three weeks. This was last week; so it would be two weeks by now. He goes out and does a lot

A-34

1 pgbr

2 tours, lectures -- he goes all over the world, all over the
3 country. He is a very, vey good orthopedist. He is one
4 of the top orthopedic surgeons in the country.

5 THE COURT: Is he an operating orthopedic surgeon
6 or a teaching one?

7 DEFENDANT BROWN: Yes, he does operate. The
8 last time we went there to see him he got jammed up and
9 he could not see the kid because he was performing an
10 operation in The New York Hospital. I think it was the
11 New York Orthopedic Hospital, if I am not mistaken.

12 THE COURT: Have you any business ties at the pre-
13 sent time?

14 DEFENDANT BROWN: Yes, sir. I do. I am general
15 manager of Federeco Trucking Corporation, and I own EDM
16 Garage Corporation, and I supervise over 40 men. We have
17 a 24-hour a day business. I am always on call. The garage
18 is run by running the trucking company -- the bulk of them
19 together.

20 THE COURT: I am going to stay the date for
21 surrender until May 12th at 10 o'clock in Room 506.
22 In the meantime, I call to your attention that any violation
23 of your obligation to conduct yourself lawfully under
24 federal, state and city statutes, rules, and ordinances,
25 including any attempt at bail jumping and failure to

A-35

Sentence

pgbr

9

return, would constitute evidence of a new crime and involvement which would have separate consequences of up to five years imprisonment and a very substantial fine.

Do you understand that?

DEFENDANT BROWN: Yes, sir.

THE COURT: Do I have your assurance that you will appear for surrender on May 12th?

DEFENDANT BROWN: You have my assurance, your Honor.

THE COURT: The execution of the sentence, that is, your surrender, shall be on May 12, 1975, as indicated, and I believe I have already stated that the remaining counts, with the consent of the government, are dismissed.

The surety bond will continue in full force and effect until the date of surrender, the actual surrender.

See to it that you do not put any new burdens on your family in addition to those already on them.

DEFENDANT BROWN: I promise you I won't.

- - -

A-36

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA :

-v- :

INDICTMENT

JAMES BROWN, :

a/k/a James Federico, :

JAMES J. PHILIPS, :

FREDRICK G. HORWITZ and :

MARVIN STOFF, :

Defendants. :

S- 74 Cr. 863

-----X

The Grand Jury charges:

COUNT ONE

The Conspiracy

1. From on or about January 1, 1973, up to and including the date of the filing of this indictment, in the Southern District of New York and elsewhere, the defendants JAMES BROWN, a/k/a James Federico, JAMES J. PHILIPS, FREDRICK G. HORWITZ, and MARVIN STOFF, and other persons to the Grand Jury known and unknown, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other to commit offenses against the United States, that is, violations of Title 18, United States Code, Sections 472, 473 and 474.

2 COPIES RECEIVED 1:15 P.M. ON 7/15/75

General L. Smith

SPECIAL ATTORNEY